

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

ESTATE OF WANGSHENG LENG, by
and through administrator, LIPING YANG,

Plaintiffs,

v.

THE CITY OF ISSAQUAH, ISSAQUAH
POLICE OFFICER M. LUCHT #1201, and
ISSAQUAH POLICE OFFICER KYLEN
WHITTOM, #1210,

Defendants.

No. 2:19-cv-00490-TSZ

DEFENDANTS' MOTION FOR
CLARIFICATION AND
RECONSIDERATION REGARDING
COURT'S *DAUBERT* RULINGS (DKT. #
112)

NOTE ON MOTION CALENDAR:

DECEMBER 15, 2020

I. INTRODUCTION

Pursuant to Local Rule 7(h), Defendants respectfully request the Court clarify and/or reconsider its *Daubert* rulings at Docket Number 112.

Defendants request clarification of the following rulings:

- Whether the Court intended to exclude Dr. Irv Scher entirely when Plaintiffs did not request such relief (*See* Dkt. # 68);
- Whether the Court intended to exclude any reference to the use of force factors identified in *Graham*, in addition to the use of the phrase “*Graham v. Connor*,” or just the case name itself.

Defendants request reconsideration of the following rulings:

- Excluding Dr. Scher’s opinion that Mr. Leng’s injury was not the product of an acute loading event.
- Excluding Dr. Scher’s opinion that Mr. Leng was especially susceptible to the injury he sustained.
- Excluding Dr. Scher’s opinion that determining the precise quantum of force necessary to result in Mr. Leng’s injury is impossible, where Dr. Arden’s opinion is that it is possible.
- Excluding Dr. Scher’s opinion that one cannot say the force used to result in Mr. Leng’s injury was “significant,” or “substantial,” where Dr. Arden’s opinion is that such force was used.

Finally, before denying this requested relief, Defendants would respectfully request the Court conduct a *Daubert* hearing into Dr. Scher’s opinions and the bases for them.

II. STATEMENT OF FACTS

1. Dr. Scher is not offering medical opinions.

The Court is correct that Irving Scher, Ph.D., is not a medical doctor and is not qualified to diagnose medical conditions (nor is he attempting to do so here). Dr. Scher is a

1 bioengineer.¹ The opinions he has offered are not opinions for which a medical doctor
 2 would be qualified to give. Instead, those opinions are uniquely capable of being addressed
 3 by someone in Dr. Scher's field. Dr. Scher went to great lengths in his deposition to
 4 describe the relationship between the medical field and his field (biomechanics):

5 When you have some type of event, I think of things unfolding in a timeline.
 6 You have some event, you know, whether it's a car accident or something
 7 like we have here or a slip and fall or whatever it is, there are forces applied
 8 to an individual, an individual goes through motions, there's forces internal
 9 to the body, and there's motions between segments of the body. Those forces
 10 and motions can create some type of damage or problem with the body, what
 11 we call an injury. And that link between the event, looking at the forces and
 12 motions to create damage to the human body, that's biomechanical
 13 engineering, that's what I've been trained in. That's what we were just
 14 discussing. When you have the injury, then the individual needs to figure out
 15 exactly what's wrong and how to get better so they get diagnosed and
 16 treated. And that eventual treatment comes to an outcome, hopefully, the
 17 outcome brings the individual to a situation that they were in before the
 event even started, but that link between the injury and the outcome where
 you're being diagnosed and treated that's medical science. That's what
 medical doctors are typically trained in. So we like to think of in the
 biomechanical engineering community as being on opposite sides of the
 injury. Medical doctors may have some anecdotal knowledge of
 biomechanics, and biomechanical engineers may have some anecdotal
 knowledge of medicine, but, really, we're trained in different areas. So we
 kind of separate them, if that makes sense.

18 *Declaration of Brian C. Augenthaler*, Ex. A (*Scher Dep. Tran.*, 23:6-24:15).

19 Plaintiffs' counsel replied to Dr. Scher's explanation, "Got it. It does make sense."
 20 *Id.* at 24:15-20. Counsel went on to clarify that Dr. Scher was not purporting to offer any
 21 medical opinions, and Dr. Scher confirmed that was the case. *Id.* Dr. Scher adhered to those
 22 principles in his reports and in his letter submitted in response to Plaintiffs' motion
 23 "excluding certain proffered expert testimony of defense expert witness Irving S. Scher."
 24 *See* Dkt. # 81-1; # 68, 1:16-18; *Declaration of Irving Scher*, ¶ 16.
 25

26
 27 ¹ Dr. Scher, like Dr. Hayes mentioned in the Court's footnote, relies on a radiologist for interpretation of
 medical imaging, along with medical records specific to the subject person. *Scher Decl.*, ¶ 10.

2. Both sides' police practices experts are discussing the *Graham* factors.

The *Graham* factors for analyzing the reasonableness of force are the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Plaintiffs' police practices expert, Susan Peters, addresses each of the factors.² Dkt. 67-1, p. 11, ¶ 12. That Ms. Peters' analysis of these factors is in the same order as set forth in *Graham* is not a coincidence.

III. LEGAL AUTHORITY

1. Defendants respectfully request clarification on the following rulings.

a. It is unclear whether the Court intended to exclude Dr. Scher entirely.

The Court's ruling reads, "Plaintiffs' motion, docket no. 68, to exclude Irving Scher, Ph.D. is GRANTED." Dkt. #112, 2:2-3. Plaintiffs' motion at Docket Number 68 did not request such broad relief. Instead, the motion and corresponding proposed order requested only that the Court "Exclude Certain Testimony from Defendants' Expert, Dr. Irving Scher..." Dkt. # 68-1, 2:4-6. Defendants respectfully request the Court clarify whether it intended to grant broader relief than that requested of the Court by Plaintiffs, or whether the Court intended to only exclude "Certain Testimony" as sought by Plaintiffs.

b. It is unclear whether the experts will be allowed to address the *Graham* factors.

The Court ruled, "Paynter will not be permitted to offer legal opinions, including any application of the factors set forth in *Graham v. Connor*, 490 U.S. 386..." Dkt. #112, 3:4-7 (¶ 6(b)). It is unclear whether the Court intends for there to be no mention of the substance of the underlying factors or whether the problematic testimony is the reference to "*Graham v. Connor*." The police are trained to evaluate the use of force under the "*Graham*

² Ms Peters wrote, "At the time of contact, Officers did not have probable cause to arrest Mr. Leng for any type of crime. He did not pose an immediate threat to the safety of officers or others. He was not actively resisting arrest or attempting to flee. Accordingly, the use of force by officers was objectively unreasonable and therefore excessive and unnecessary."

factors” in assessing the reasonableness of the force contemplated. *Declaration of Jeffrey C. Paynter*, Dkt. # 4, ¶ 2. Defendants respectfully request clarification whether the Court’s intent was to preclude any reference to the factors (whether or not the testimony includes the case name) and whether that prohibition will apply equally to both sides’ experts.

2. Defendants respectfully request reconsideration of the following rulings.

The source of the Court’s rulings on Dr. Scher’s opinions seems to arise from an (understandable) confusion over the relationship between the practice of medicine and the discipline of biomechanical engineering. Biomechanical engineering is a widely recognized subdiscipline of bioengineering, a field for which there can be no reasonable debate that Dr. Scher is qualified to opine. *Scher Decl.*, ¶ 13. Defendants respectfully request the Court reconsider the following rulings related to Dr. Scher.

- a. Dr. Scher should be permitted to testify that Mr. Leng’s injury was the not the result of an acute loading event.

Dr. Scher, of all the witnesses in this case, is uniquely qualified to discuss whether Mr. Leng’s injury was the result of an acute loading event (application of a single force of sufficient magnitude to cause injury to Mr. Leng’s body). *Scher Decl.*, ¶ 17. The Court’s ruling excluding this testimony may stem from the apparent conflation of the diagnosis of Mr. Leng’s preexisting spinal cord condition with how force would interact with that specific condition as a scientific matter.³ For Mr. Leng’s underlying physiology, Dr. Scher is relying entirely on the conclusions drawn by treating providers, the medical examiners, and the radiologist he consulted with in preparation for submitting his reports. *Id.* at ¶ 18. Dr. Scher took that information and applied well-accepted biomechanical engineering principles to arrive at his opinion that there was no application of a single force of sufficient magnitude to cause the injury to someone other than Mr. Leng⁴. *Id.* at ¶ 17.

³ For this same reason, the comparison of Dr. Scher’s and Dr. Hayes’s credentials is inapt. Dr. Scher is *not* attempting to opine on the original cause of Plaintiffs’ preexisting spinal condition. Instead, Dr. Scher is applying accepted bioengineering principles to help the jury understand the types of force that would be necessary to result in the injury Mr. Leng ultimately sustained. Dr. Hayes possesses no superior qualifications for rendering that opinion than does Dr. Scher. *Scher Decl.*, ¶ 10.

⁴ Or someone else with his unique spinal anatomy.

1 The Court's exclusion of Dr. Scher's "no acute loading event" opinion should be
2 reconsidered. *See id.* at ¶ 17.

- 3 b. Dr. Scher should be permitted to testify that Mr. Leng was especially
4 susceptible to the injury.

5 It is not reasonably disputed that Mr. Leng's cervical spine would not have been
6 injured but for his unique spinal anatomy. Dr. Arden, Plaintiffs' medical examiner expert,
7 opines, "In summary, these degenerative processes caused fusions and stiffness in the
8 cervical spine, with some narrowing of the canal that contains the spinal cord. These
9 processes would render more susceptible to spinal injury, in particular fracture with
10 potential dislocation, due to the stiffening and diminished flexibility of the cervical
11 vertebral column." Dkt. # 67-4, p. 4. He downplays the significance of this finding as it
12 pertains to causation as "speculative." *Id.* Dr. Arden admits he is not a biomechanical
13 expert but has reviewed biomechanics reports in the "big picture of cases". *Augenthaler*
14 *Decl.*, Ex. B (*Arden Dep. Tran.*, 9:18-10:16). Dr. Arden can only address the significance of
15 Mr. Leng's preexisting spinal cord condition "theoretically," and he lacks the background
16 to address the mechanism of injury from a force perspective like Dr. Scher. *Id.* at 66:6-20.
17 Plaintiffs can present Dr. Arden's testimony, which is essentially inconclusive on the role
18 Mr. Leng's condition had on the ultimately injury. But so too should Defendants be able to
19 present their biomechanical engineer's opinion that Mr. Leng was far more susceptible to
20 his ultimate injury as a result of his unique spinal anatomy. *Scher Decl.*, ¶ 18.

21 The Court's exclusion of Dr. Scher's "susceptibility" opinion should be
22 reconsidered. *See id.* at ¶¶ 17-20.

- 23 c. Dr. Scher should be permitted to testify that it is not reasonably possible to
24 quantify the precise force necessary to cause Mr. Leng's injury.

25 Dr. Arden, Plaintiffs' expert, will testify "Causing a cervical spinal cord injury
26 requires substantial force applied to the neck." Dkt. #67-4, p. 3. Dr. Scher should be
27 permitted to testify that Dr. Arden's opinion that there was "substantial force" is

1 inconsistent with biomechanical engineering principles because there is no way to
2 determine the amount of force given Mr. Leng's specific anatomy.

3 There is a logical fallacy built into Dr. Arden's opinion on this point: if one cannot
4 tell the precise force necessary to cause Mr. Leng's opinion, then it is fair to assume the
5 force was "substantial." While one avenue to address that is through cross-examination and
6 argument, Defendants should also be allowed to rebut Dr. Arden's opinion that the force
7 causing Mr. Leng's injury was "substantial" by introducing a competent bioengineering
8 opinion that there is no way to determine with any precision the degree of force that would
9 have been necessary to cause that injury. The Court's ruling excluding Dr. Scher's opinion
10 on this point is based on the sensible position that a discussion of this broad range of
11 potential forces would not assist the jury's fact-finding mission. Defendants fully agree *but*
12 *for the fact that Plaintiffs will put on evidence that the force was "substantial" according to*
13 *Dr. Arden.* Plaintiffs should not be allowed to have it both ways. If Dr. Scher is precluded
14 from referencing this wide range of potential force, then so should Dr. Arden.

15 The Court's exclusion of Dr. Scher's "no precise force" opinion should be
16 reconsidered. *See Scher Decl.*, ¶ 20.

17 **3. Alternatively, Defendants respectfully request as *Daubert* hearing.**

18 If the Court is inclined to deny this Motion, Defendants respectfully request the
19 Court first hold a *Daubert* hearing to further consider Dr. Scher's qualifications, opinions,
20 and their bases, directly from the expert himself. While such hearings are not required, they
21 can be helpful in avoiding unnecessary appellate practice. *See In re Hanford Nuclear*
22 *Reservation Litig.*, 292 F.3d 1124, 1139 (9th Cir.2002).

23 **IV. CONCLUSION**

24 For the reasons stated above, Defendants respectfully request the Court grant this
25 Motion for Clarification/Reconsideration.

26 //

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1 DATED: December 15, 2020

2 KEATING, BUCKLIN & McCORMACK, INC., P.S.

3
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CERTIFICATE OF SERVICE

I hereby certify that on the below date, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: N/A.

DATED: December 15, 2020

/s/ Brian C. Augenthaler

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